NO. 86117-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

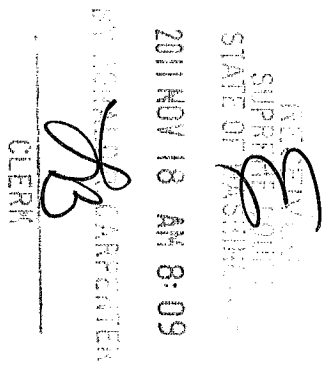
STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. ROWLAND,

Petitioner.



SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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I. ISSUES

1. The Court of Appeals granted the petitioner's personal restraint petition but did not vacate the petitioner's judgment and exceptional sentence that were final years before the decision in Blakely v. Washington.[1] It merely remanded for resentencing based on the corrected offender score and again affirmed the exceptional sentence. The sentencing court corrected and amended the original judgment and sentence, but stated it was not exercising its discretion. The court sentenced the petitioner to the same exceptional sentence based on the correct standard range. Was the petitioner entitled to a new fact finding on the basis for the exceptional sentence where that issue was fully litigated in the petitioner's original appeal?

2. If there was a Blakely error, was it harmless beyond a reasonable doubt, since the evidence supporting the finding of deliberate cruelty was overwhelming and unchallenged?

3. The petitioner raised a new issue concerning his offender score. The court stated on the record that it would impose the same sentence even if the petitioner's offender score was 1. Did

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[1] 542 U.S. 296, 124 S.Ct. 2534, 159 L.Ed.2d 403 (2004).

the Court of Appeals err in finding the offender score error did not require re-sentencing?

II. STATEMENT OF THE CASE

In November, 1988, the petitioner and an accomplice murdered Kenneth Ecklund and took his truck. On January 31, 1991, a jury convicted the petitioner of first degree murder and taking a motor vehicle without permission. On March 20, the court sentenced the petitioner to an exceptional sentence consisting of the top of the standard range based on an offender score of 3 plus 15 years for deliberate cruelty. The court found:

> The defendants exhibited deliberate cruelty by inflicting sixteen stab wounds following an axe blow to the head; by telling the victim, during the course of the murder: "You're dying, Dude"; by stuffing a hat into the victim's mouth as he tried to crawl away from his home to stifle any further cries or pleas while inflicting the last of the stab wounds.

State v. Rowland, No. 28109-7-I, slip op. at 10, review denied, 126 Wn.2d 1025 (1995) (Rowland I). The mandate was issued on June 26, 1995.[2] In re Personal Restraint of Rowland, 149 Wn. App. 796, 501, 204 P.3d 935 (2009) (Rowland II).

In January, 2007, the petitioner filed a motion to modify his judgment and sentence, arguing that his offender score should

[2] A copy of the slip opinion and mandate are at Appendix A.

have been 2. The Court of Appeals granted the petition as to the offender score and remanded for resentencing. The mandate of the Court of Appeals allowed, but did not require, the court to reduce the sentence, and observed:

> Rowland's exceptional sentence is not being remanded because the aggravating factor was found by a judge rather than a jury. . . . The error in the offender score potentially bears upon the length of the exceptional sentence, but it does not implicate the findings that justified imposition of the exceptional sentence.

Rowland II, 149 Wn. App. at 512. The mandate stated "We affirm the exceptional sentence and remand to correct the offender score and standard range consistent with this opinion."

On September 17, 2009, the court resentenced the petitioner. The court stated:

> Mr. Rowland, I gave a great deal of thought to the sentence that I imposed when I sentenced you 18 years ago. I see no reason to change that sentence now, not up, not down. And I'm not going to, except for the fact that the sentencing score has changed. . . . So I now sentence you to the high end of the range with a score of two, which is 347 months plus 180 months, which is 15 years for the exceptional sentence that I imposed 18 years ago and I re-impose now.

9/16 RP 24-25.

The court held that it could not consider the petitioner's contention, raised for the first time at resentencing, that his offender

score should be 1. The State asked the court to state whether it would re-impose the same sentence if it was later determined that the petitioner's correct offender score was 1. The court stated, "If the scoring range is determined to be a one rather than a two, . . . the sentence that I imposed today would be the same sentence that I would impose if it came back in front of me." 9/16 RP 29.

The petitioner appealed the sentence. He argued that the court improperly relied on facts not found by a jury to impose an exceptional sentence and his offender score should have been a 1. The Court of Appeals held "the resentencing court did not exercise independent judgment or discretion when it ordered the exceptional sentence but merely substituted the high end of one standard range for that of another and reimposed the original exceptional sentence." State v. Rowland, 160 Wn. App. 316, 328, 249 P.3d 635, review granted, 172 Wn.2d 1014 (2011) (Rowland III).

The Court of Appeals then considered the petitioner's new challenge to his offender score. The Court of Appeals held that the score should have been 1. Rowland III, 160 Wn. App. at 331. The Court of Appeals found that the court would impose the same sentence it imposed on September 16, 2009, with an offender score of 1. The Court of Appeals remanded for correction of the

offender score and standard range, but not for resentencing. Rowland III, 160 Wn. App. at 332.

This Court granted review of the Court of Appeals decision. State v. Rowland, 172 Wn.2d 1014, 262 P.3d 63 (2011).

III. ARGUMENT

A. INTRODUCTION.

When only part of a sentence is reversed, and the remainder of the sentence is affirmed, the finality of that part of the judgment and sentence that is affirmed is not affected. Further, when a court declines to exercise its discretion on resentencing, there is no appealable issue in the re-imposition of the sentence.

The decision whether to impose an exceptional sentence and its length are the province of the court, not the jury, under the Sentencing Reform Act. This part of the Act survived Blakely, which only addresses the procedure for determining the factual basis for an exceptional sentence. Since the factual basis for the exceptional sentence was not disturbed in Rowland II, was final long before Blakely, and Blakely is not to be applied retroactively, there is no basis for re-litigating the factual basis for the exceptional sentence.

Should this Court determine that Blakely applied to the petitioner's resentencing, and the failure of the court to convene a jury to determine if there were facts that would support an exceptional sentence was error, Blakely errors are to be analyzed under a constitutional harmless error standard. Here, since the factual basis for the exceptional sentence had been fully litigated and affirmed on the merits on appeal, it was the law of the case. In any event, the evidence supporting the court's finding of fact was overwhelming and uncontroverted. Accordingly, any error was harmless beyond a reasonable doubt.

Even though the Court of Appeals again reduced the offender score in Rowland III, the sentencing court made it clear it would impose the same sentence even if the petitioner's offender score was 1. Accordingly, remand for correction of the judgment and sentence to reflect the correct offender score and standard range was the appropriate remedy.

B. STANDARD OF REVIEW.

Holding part of a sentence to be erroneous "did not affect the finality of that portion of the judgment and sentence that was correct and valid when sentence was imposed." In re Personal

Restraint Petition of Goodwin, 146 Wn.2d 681, 869, 50 P.3d 618 (2002).

"Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

"The Supreme Court recently determined that Blakely errors are not structural and thus are subject to a harmless error analysis." State v. Chauvin, 723 N.W.2d 20 (Minn. 2006), citing Washington v. Recuenco, 548 U.S. 212 (2006).

"Remand is necessary when the offender score is miscalculated unless the record makes clear that the trial court would impose the same sentence." State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

C. THE COURT DID NOT EXERCISE ITS DISCRETION TO RECONSIDER THE EXCEPTIONAL SENTENCE.

This Court has long held that if a sentencing error is discovered that makes the sentence in excess of the court's authority, the appropriate remedy is to correct the error and impose a lawful sentence. McNutt v. Delmore, 14 Wn.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by, State v.

Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973). This Court has also made it clear:

> Petitioner's entire sentence is not erroneous, however. Our holding does not affect the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced.

In re Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980).

Here, the Court of Appeals in Rowland II only reversed the part of the sentence that exceeded the court's authority when it was imposed, the standard range sentence. It did not disturb the exceptional sentence. Rowland II, 149 Wn. App. at 512. Under this Court's long established precedent, there was no basis for the court to reconsider the exceptional sentence it originally imposed.

Citing State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009), the petitioner argues that "where the judge has discretion and exercises its discretion 'up or down,' the judge is imposing a new final judgment." Petition for Review 8. While that is correct:

> [W]hen, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court.

Kilgore, 167 Wn.2d at 40.

This Court also held, "The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." Kilgore, 167 Wn.2d at 42. Here, the Court of Appeals permitted, but did not require, reconsideration of the exceptional sentence. Rowland II, 149 Wn. App. at 512. The court made it clear that it was not reconsidering the exceptional sentence when it resentenced the petitioner. Under Kilgore, there was no exercise of independent judgment by the trial court on remand. As the Court of Appeals concluded, there was nothing about the exceptional sentence to review. Rowland III, 160 Wn. App. at 328.

Relying on State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003), the petitioner argues that "when a case is 'remanded for resentencing,' it means that 'the entire sentence was reversed or vacated[.]" Petition for Review 8. That reliance is misplaced.

Harrison involved a breach of the pretrial agreement by the State. It agreed to recommend a sentence based on an offender score of 7, then argued that the offender score was 8. The court sentenced Harrison using an offender score of 8. When the Court of Appeals reversed, it granted Harrison specific performance of the State's bargain. At resentencing, the court held it was bound by the earlier sentence and imposed the same exceptional sentence.

Harrison, 148 Wn.2d at 553-54. This Court then held that specific performance meant putting Harrison in the position he was in before the breach. Accordingly, the court was not bound by either the law of the case or collateral estoppels from independently determining whether an exceptional sentence was warranted. Harrison, 148 Wn.2d at 563. This Court did not hold that where there was no breach of a pretrial agreement, remand for resentencing vacated the entire sentence.

Here, the Court of Appeals was very specific that it was not addressing the exceptional sentence. The court did not exercise independent judgment when it re-imposed the exceptional sentence. Accordingly, since the exceptional sentence was final long before Blakely was decided, no re-hearing on the factual basis for that sentence was required.

As the Court of Appeals noted, the court did not exercise discretion when it re-imposed the same exceptional sentence during resentencing. Had it imposed a different exceptional sentence, or no exceptional sentence, there would still have been no basis for re-litigation of the factual basis for that sentence. Rowland III, 160 Wn. App. at 329.

> Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court . . . except as provided in rule 2.5(c).

RAP 12.2.

One of the issues in Rowland I was the factual and legal basis for the exceptional sentence. Rowland I, slip op. at 18-21. The Court of Appeals ruled that "there is substantial support in the record for the trial court's finding [of deliberate cruelty]," and "as a matter of law, the trial court's finding of deliberate cruelty justified an exceptional sentence above the standard range." Rowland I, slip op. at 19, 21. After this Court denied review, the mandate issued. Accordingly, the decision of the Court of Appeals was binding on the trial court. RAP 12.2.

The petitioner could have asked the Court of Appeals to review the propriety of its earlier rulings on the exceptional sentence in Rowland II or Rowland III. RAP 2.5(c)(2).[3] He did not. Accordingly, the factual and legal basis for the exceptional

[3] "The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." RAP 2.5(c)(2).

sentence were not open for re-litigation during the resentencing hearing.

D. ANY BLAKELY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The United States Supreme Court has held that a Blakely error is subject to a harmless error analysis under Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." Washington v. Recuenco, 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

This Court had adopted the holding in Neder that omitting an element in the "to convict" instruction was subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) ("We find no compelling reason why this Court should not follow the United States Supreme Court's holding in Neder."). In Brown, the jury was given an accomplice liability instruction that was an incorrect statement of the law. This Court applied the test set out in Neder that an omitted or misstated element in a jury instruction was harmless "if that element is supported by uncontroverted evidence." Brown, 147 Wn.2d at 341.

Accordingly, if this Court determines that the failure to hold a factual hearing was a Blakely error, the petitioner is not entitled to relief if, beyond a reasonable doubt, the result would have been the same had the error not occurred. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). A failure to instruct on an element of an offense is harmless if the reviewing court determines "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence[.]" Neder, 527 U. at 17; Brown, 147 Wn.2d at 340.

Here, there was overwhelming evidence that the victim was hit in the head with an ax, then stabbed 16 times. While the petitioner and his accomplice were doing this, one of them said to the victim, "You're dying, Dude." When the victim was trying to crawl away, either the petitioner or his accomplice stuffed a hat into his mouth "to stifle any cries or pleas while inflicting the last of the stab wounds." Rowland I, slip op. at 10. The petitioner has not presented any evidence contesting this. There can be no doubt that the jury would have reached the same conclusion that the court reached: this crime was committed with deliberate cruelty.

> In cases such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.

Neder, 527 U.S. at 18.

Applied to this case, applying the constitutional harmless error analysis to any Blakely error would not undermine the jury guarantee of Blakely.

E. REMAND FOR CORRECTION OF THE JUDGMENT AND SENTENCE WAS THE PROPER RELIEF FOR THE SECOND OFFENDER SCORE ERROR.

Where a sentencing court makes it clear it will impose the same exceptional sentence even if the offender score is later reduced, remand for resentencing is not required. Tili, 148 Wn.2d at 358.

Here, the court made it clear that it would re-impose the same sentence if the case were remanded after a ruling that the petitioner's offender score was 1, not 2. 9/16 RP 29. The Court of Appeals granted the petitioner the appropriate remedy. Rowland III, 160 Wn. App. at 334. It is not in the interests of judicial economy to require the court to resentence the petitioner again.

The petitioner argues that since the length of the exceptional sentence will necessarily be longer with an offender score of 1.

> Rowland should receive a new sentencing hearing at which his offender score is first correctly calculated and the judge imposes an exceptional sentence only after following the mandatory statutory and constitutional procedures under Blakely and RCW 9.94A.535 and RCW 9.94A.537.

Petition for Review 18.

As discussed above, the length of the exceptional sentence is within the discretion of the trial court. The factual basis has been litigated through the petitioner's first appeal. There is no basis for re-litigation.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the decision of the Court of Appeals.

Respectfully submitted on November 17, 2011.

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Snohomish County Prosecuting Attorney

By: Seth A. Fine #10937

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Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

SLIP OPINION AND MANDATE FROM ROWLAND I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. ROWLAND,

Appellant,

CONSTANCE M. MAWYER,

Defendant.

No. 28109-7-I

MANDATE

Snohomish County

Superior Court No. 90-1-00034-1

FILED
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KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

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VTL. STAT.

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County.

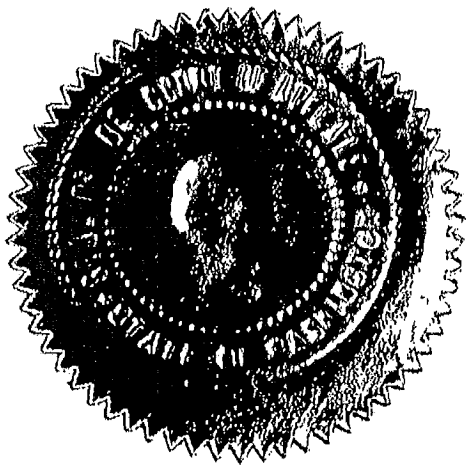
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on January 17, 1995, became the decision terminating review of this court in the above entitled case on June 26, 1995. An order denying motions for extension and reconsideration was entered on March 16, 1995. An order denying a petition for review was entered in the Supreme Court on June 7, 1995. This cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

90-1-00034-1 255

RP

255

c: Donna Reilly McNamara
Nancy Lynn Talner
Michael Dennis Magee
David Frederick Thiele
Hon. Gerald L. Knight
Reporter of Decisions
Indeterminate Sentencing Review Board



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 26th of June, 1995.

ANNE NORIS
Clerk/Staff Attorney of the Court of Appeals, State of Washington, Division I.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

Rosselle Pekelis
CHIEF JUDGE

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION I
DATE JAN 17 1995
Rosselle Pekelis
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL J. ROWLAND, Appellant, CONSTANCE M. MAWYER Defendant.	NO. 28109-7-I DIVISION ONE FILED: JAN 17 1995

COLEMAN, J. -- Michael J. Rowland appeals his judgment and sentence for one count of murder in the first degree and one count of taking a motor vehicle without permission, arguing that the trial court erred by: (1) granting the State's motion for a continuance; (2) failing to dismiss the case pursuant to CrR 8.3; (3) admitting in-life photographs of the deceased victim; (4) miscalculating his offender score; and (5) imposing an exceptional sentence upward. We affirm.

I. FACTS

In November 1988, Constance Mawyer and Toni Rowland were hitchhiking along a road near Arlington, Washington. Kenneth

Ecklund was driving by and stopped to pick them up. Mawyer and Toni accepted the ride and stayed as guests that night in Ecklund's trailer. The following day, Rowland, Toni's brother, joined them, and all four individuals spent the day together hunting and drinking. Sometime in the early evening, Mawyer and Rowland repeatedly stabbed, struck, and killed Ecklund.[1] His body was covered with a small boat, and Mawyer, Toni, and Rowland left the scene in Ecklund's truck.

Pretrial History

In January 1990, Rowland and Mawyer were charged by information for murder in the first degree (count 1) and taking a motor vehicle without permission (count 2). The State charged Toni only for count 2 in exchange for her testimony about count 1.

On January 16, 1990, Rowland was arraigned and placed in jail pending trial. The original trial date was scheduled for February 20, 1990. Due to the number of witnesses and the amount of discovery, Rowland moved for a 4-month continuance from February 20, 1990, to June 25, 1990, and he waived his speedy trial right to July 9, 1990. The court granted the motion.

[1]Ecklund received one hatchet blow and eight stab wounds to his head, three stab wounds to his neck, and five stab wounds to his back and upper shoulders. According to the medical examiner, no one wound could be isolated as the fatal wound; the cause of death was the wounds in combination.

Later, Rowland requested a second continuance from June 25, 1990, to September 6, 1990, and he waived his speedy trial right to October 1, 1990. Again, the court granted the motion.

The trial began on September 17, 1990, but it was later dismissed on the basis of a mistrial. The court promptly conducted a hearing to set a new trial date, indicating that the coming Monday was available.[2] None of the parties wanted to proceed that Monday. Codefendant Mawyer requested an October 22 trial date, and the State requested a November 19 trial date. Rowland indicated that October 22 would be his first choice, November 19 would be his second choice, and the coming Monday would be his "far distant and last choice." The court scheduled the new trial for November 19, 1990.

In early October, the State received a letter from the doctor of one of its out-of-state witnesses. The letter indicated that Susan Bristol was pregnant and could not travel after the first week in November. The prosecutor informed both defense counsel, proposing to reset the trial date for October 22 (one of the previously suggested trial dates) or October 29. For reasons that are not set forth in the record, both attorneys rejected these dates.

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[2]Because Rowland was in custody, the new trial had to begin within 60 days of the mistrial, i.e., November 26, 1990. CrR 3.3(d)(3).

On October 30, 1990, the court conducted another hearing to reset the trial date. The defendants favored taking a pretrial videotaped deposition of Bristol in Oregon and going to trial as scheduled in November. The State objected to a videotaped deposition and asked the court to continue the case until after Bristol's delivery, suggesting December 17 or any day after Christmas. Finding that Bristol was a material witness whose unavailability for trial in November had not been anticipated, the trial court ruled that there was good cause for granting a continuance and proposed a December 17 trial date. Rowland's attorney objected to this date on the basis that it violated Rowland's speedy trial right. Rowland's attorney also indicated that he would be unavailable until mid-February. The trial court scheduled another hearing in November.

At the November hearing, Rowland's attorney told the court that Rowland wanted to have a replacement attorney in lieu of a February trial. The proposed replacement attorney appeared at the hearing and indicated that he could try the case on either December 17 or January 2. The court allowed the replacement attorney and set the trial date for January 2, 1991. This date was subsequently changed to January 7, 1991, after the court discovered that the week of January 2 was not a jury week. Rowland's attorney maintained his claim of a speedy trial violation. The new trial began on January 7, 1991.

Trial Testimony

Conflicting versions of the crime were presented at trial. According to Mawyer and Toni, Rowland suggested that they "take out" the victim and steal his car. Rowland concealed a hunting knife in his pants and stated that he would attack after giving a signal. Both women refused. Rowland stated that he would do it himself. Mawyer and Toni decided between themselves that if Rowland proceeded, Mawyer would knock Ecklund out to save him from being killed by Rowland.

That night, when Rowland gave the signal, Mawyer grabbed something in the dark and swung it at the back of Ecklund's head. She claims that she did not know what kind of instrument she had used. When Ecklund stood up and exclaimed, "What the hell is happening," Rowland attacked Ecklund, stabbing him with a knife. At one point, Ecklund asked again what was going on, and Rowland stabbed upward at his throat, replying, "You're dying, dude." As Ecklund and Rowland struggled, the women left the trailer.

After fighting his way outside, Rowland followed Ecklund and stabbed him a final time. Ecklund softly called for help, and Rowland stuffed a cap in his mouth. Ecklund quit moving and Rowland ordered Mawyer to help him cover the body with an overturned boat.

Rowland presented a much different story at trial. He testified that after their hunting excursion, he and Ecklund went

to the store. Upon their return to the trailer, the two men found Toni and Mawyer packed and ready to leave. Ecklund and Rowland began talking at the table when Mawyer suddenly hit Ecklund in the back of the head with an axe. When Ecklund recovered from the blow, he had a knife in his hand. Believing that Ecklund intended to stab Mawyer, Rowland grabbed at the knife, but it "flew away from him."

Rowland and Ecklund wrestled to the ground and, while Ecklund was on top trying to poke out Rowland's eyes, Rowland cried, "Get him off me!" Mawyer responded by stabbing Ecklund and grabbing him off of Rowland. Ecklund struggled out of the trailer, and Rowland fled toward the road. When Rowland returned, Mawyer told him not to worry, "he's dead, he's not breathing." At Toni's request, Rowland helped cover the body.

Rowland denied that he ever discussed, planned, or intended to kill or rob Ecklund. He also denied ever stabbing the victim. Rowland believes that Mawyer attacked Ecklund because he had showed a sexual interest in Mawyer's partner, Toni.

Also testifying at trial were several witnesses who conveyed various inculpatory statements made to them by Mawyer and/or Rowland. Susan Bristol, Rowland's cousin, testified that she had seen Rowland prior to his arrest and that he had mentioned that someone had been killed. Rowland told her that

Toni and Mawyer had met a man, and that Rowland went with them to the man's trailer. While they were in the trailer, Mawyer picked something up and hit the man. According to Bristol, Rowland indicated that Toni had not participated, but he did not mention what role he had played in the attack.

Bristol testified that she also spoke to Mawyer about the crime. Mawyer told her that Ecklund had flashed a knife at Rowland and so she hit Ecklund in the back of the head with something. Mawyer told Bristol that Toni did not participate in the attack.

Tamara Tibbetts, Rowland's girl friend, testified about a conversation in which Mawyer told her that she had killed a man in Washington. She told Tibbetts that she was afraid the man would kill them, and so she hit the man with the blunt end of an axe. Mawyer further stated that when they were outside the trailer, she put all of her weight on the man's head until she heard it snap.

Raymond Latre, Tibbetts' son, stated that prior to the defendants' arrest, he arrived home one night to find Mawyer crying. She told Latre about a murder in Washington and how she had hit a man with an axe. Mawyer stated that the man came at her and she "kept stabbing him, trying to get him to stop." When the victim was down but "still moving," Mawyer kicked him and jumped on his back. According to Mawyer, Rowland and Toni were

"frozen." She and Toni then hid the body under a boat. Mawyer told Latre that "if it came down to it, she would blame [Rowland]."

Lori Cooper, Latre's girl friend, came in and out of the room during Mawyer's story. Cooper testified that Mawyer had said that "she was stabbing him and he kept coming after her and then she picked up the axe and hit him in the head with it." Rowland remained in the corner scared. Mawyer stated that she attacked Ecklund because he was making a pass at Toni.

Dora Jane Thomas, Rowland's father's girl friend, testified about prearrest statements made to her by both Mawyer and Rowland. While visiting Thomas, Rowland told her that Mawyer had picked up an axe and hit Ecklund. Ecklund then came at Rowland, so Rowland stabbed him. Mawyer picked up a knife and also started stabbing Ecklund. Rowland got sick and dropped out of the struggle. Mawyer "finished [Ecklund] off" outside of the trailer by continuing to stab him and by breaking his neck. Toni and Mawyer then hid the body under a boat.

On a separate occasion, Mawyer also talked to Thomas about the attack and said "essentially the same thing that Michael" had. Mawyer admitted to hitting Ecklund with the axe and to stabbing him. Mawyer stated that she "was afraid for Toni because he had his eye on her[.]" Mawyer and Toni had formulated an "alternate plan" in case they were arrested.

On January 31, 1991, the jury returned a general verdict, finding both Rowland and Mawyer guilty of first degree murder and taking a motor vehicle without permission.

Sentencing

At sentencing, the State submitted documentary evidence that Rowland had three prior California convictions, including: (1) a felony sale of heroin in April 1983; (2) a felony possession of heroin in December 1985; and (3) a misdemeanor burglary in July 1985. The State pointed out that under California law, the sentencing court is given the discretion to designate a burglary as a felony or a misdemeanor based on the sentence imposed and without regard to the elements of the crime. In Washington, the State indicated that the misdemeanor burglary would be characterized as a felony.

Defense counsel objected to the introduction of this evidence, arguing that he had only just received the documents and superficially reviewed them. The trial court overruled the motion and used the evidence to calculate an offender score of 3 for Rowland. Based on this score, Rowland's standard range sentence was 271-361 months. The trial court departed from a standard range sentence and imposed an exceptional sentence upward (541 months), finding that the defendants were deliberately cruel in their commission of the crime:

> The defendants exhibited deliberate cruelty by inflicting sixteen stab wounds following an axe blow to the head; by telling the victim, during the course of the murder: "You're dying, dude"; by stuffing a hat into the victim's mouth as he tried to crawl away from his home to stifle any further cries or pleas while inflicting the last of the stab wounds.

In making this finding, the trial court did not distinguish between each defendant's level of participation, stating:

> I declare an exceptional sentence as indicated for the sole ground as indicated, deliberate cruelty/multiple injuries without trying to establish who's telling me the truth in regards to the intent, because it's so diametrically opposed. The defense here I can speculate, it seems incredulous that Ms. Mawyer took an axe to take him, meaning Mr. Ecklund, to save him. Maybe so, but stretches my credulity.
>
> The defense of Mr. Rowland: I don't really know what happened, Judge, but I didn't really do anything. We can speculate all day, but I'm not going to. They both stand in front of me guilty of murder one. I'm not going to sit here and try to make out who's telling me the truth and who's not as it relates to apportioning guilt. Jury found them both guilty. They will be sentenced the same.

Rowland appeals.

II. SPEEDY TRIAL RIGHT

We initially consider whether the trial court violated Rowland's right to a speedy trial by granting the State's motion for a continuance on the basis that its material out-of-state witness was pregnant and could not travel.

In the event of a mistrial, a defendant detained in jail must be brought to trial within 60 days of the court's oral order. CrR 3.3(d)(3). A continuance is appropriate, under these circumstances, only when it is "required in the administration of

justice and the defendant will not be substantially prejudiced in the presentation of the defense. . . ." CrR 3.3(h)(2); State v. Terrovona, 105 Wn.2d 632, 651, 716 P.2d 295 (1986) (citing State v. Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986)), cert. denied, 499 U.S. 979 (1991). The unavailability of the State's material witness is a proper basis for granting a continuance when there is a valid reason for the unavailability, the witness will become available within a reasonable time, and the defendant is not substantially prejudiced. State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936 (citing State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988)), review denied, 122 Wn.2d 1008 (1993). A reviewing court will not reverse the trial court's decision to grant or deny a continuance pursuant to CrR 3.3(h)(2) absent a manifest abuse of discretion. Terrovona, at 651.

Rowland contends that his speedy trial right was violated when the trial court granted a continuance under CrR 3.3 based on the absence of the State's witness. In particular, he argues that Bristol's testimony was not material, her unavailability was reasonably foreseeable, and her testimony could have been preserved on videotape. We reject this contention.

In its oral ruling, the trial court expressly found that Bristol was a material witness whose unavailability was not reasonably foreseeable. Rowland conceded below that Bristol was

a material witness. His arguments to the contrary on appeal are therefore without merit. As for her unavailability, there is evidence in the record to support the trial court's finding that it was not reasonably foreseeable. Specifically, while all of the parties knew that Bristol was pregnant, she apparently was not showing at the time of the mistrial in September. Under these circumstances, there was probably very little reason to suspect that she would be unable to travel only 2 months later. And, significantly, the record shows that when the prosecutor did receive notice that Bristol could not travel in November, he promptly contacted defense counsel and offered Rowland two opportunities to pursue his trial prior to the expiration of the speedy trial date. Both of the October dates were declined. Given these facts, it cannot be said that the trial court abused its discretion by granting the State's motion for a continuance.

In addition, even if we assume that the continuance was improper, Rowland has failed to establish that he was substantially prejudiced in the presentation of his defense. It is true that the continuance required Rowland to seek new counsel, but there is no allegation that such counsel was ineffective or ill-prepared for trial. Rowland contends only that the replacement attorney did not have the same "tactical advantage" as his prior attorney, who participated in the mistrial. As the State asserts, however, Rowland's replacement

attorney had the benefit of studying the transcripts from that trial and, therefore, was in no weaker position to meet that testimony than Rowland's original attorney would have been. Therefore, in light of Bristol's unavailability and Rowland's failure to show prejudice, we reject his claim that the continuance violated his speedy trial right.

III. FAILURE TO DISMISS

We next determine whether the trial court erred by failing to dismiss the case pursuant to CrR 8.3(b). Under this rule, the court may, on its own motion in the furtherance of justice, dismiss any criminal prosecution. CrR 8.3(b). Dismissal is an extraordinary remedy and should not be granted in the absence of governmental misconduct or arbitrary action. Nguyen, at 916 n.9 (citing State v. Coleman, 54 Wn. App. 742, 748-49, 775 P.2d 986, review denied, 113 Wn.2d 1017 (1989)).

Rowland contends that the trial court erred by failing to dismiss the case pursuant to CrR 8.3(b), arguing that the State's investigation into the possibility of calling another witness forced an additional continuance, which, in turn, amounted to prosecutorial misconduct and violated his speedy trial right. We find that this contention is without merit.

First, the record shows that Rowland agreed to the continuance and signed a waiver of his right to a speedy trial. Having done so, Rowland cannot now complain that the continuance

was granted in error. Second, Rowland has not pointed to any facts in the record which show that the prosecutor's investigation into calling a potential witness amounted to mismanagement or misconduct. Rather, it appears that the prosecutor's investigation was simply standard pretrial preparation. The trial court, therefore, did not err by failing to dismiss the case pursuant to CrR 8.3(b).

IV. "IN-LIFE" PHOTOGRAPHS

At trial, the State offered three photographs of Ecklund before the murder. One photograph showed Ecklund with his family and two other photographs showed Ecklund at work as a contractor. Defense counsel objected to their admission, arguing that the photographs were irrelevant and unfairly prejudicial because they would inflame the jury. The State, on the other hand, argued that the photographs were relevant to prove the identity of the victim and to rebut the inference that Ecklund was a strange recluse who lived in the woods. Defense counsel offered to stipulate to Ecklund's identity in order to remove that issue from the case. The trial court overruled Rowland's objection and admitted the three photographs. In his pro se brief, Rowland claims that the trial court's admission of these photographs was prejudicial error. We disagree.

In State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989), our Supreme Court addressed a

similar issue. There, the State offered, and the trial court admitted, four photographs of four murder victims as they appeared "in life." The defendant objected on the basis of relevancy and prejudice. Rice, at 597. On review, the Supreme Court rejected the defendant's claim of error, finding first that the photographs were relevant to prove the victims' identities and that, as a matter of policy, "the State should be allowed to present the complete picture to the jury." Rice, at 599 (citing United States v. Ellison, 793 F.2d 942, 949 (8th Cir.), cert. denied, 107 S. Ct. 415 (1986)). The Court then concluded, after noting other jurisdictions which allow the admission of in-life photographs despite their potential for inflaming the jury, that the trial court acted within its discretion by finding that the photographs' relevancy was not outweighed by the danger of prejudice. Rice, at 600.

Here, the photograph of Ecklund with his family was relevant to prove the victim's identification. Similarly, the photographs of Ecklund at work were relevant to rebut the defense's characterization of Ecklund as a strange recluse who lived alone in the woods. The issue, therefore, is whether the photographs' relevance was outweighed by the danger of prejudice. ER 403. As the Supreme Court indicated in Rice, a trial court's decision in this regard is reviewed only for a manifest abuse of discretion. Rice, at 599-600 (citing State v. Mak, 105 Wn.2d

692, 702-03, 718 P.2d 407, cert. denied, 107 S. Ct. 599 (1986)). Because Rowland has failed to set forth sufficient reasons showing why no reasonable person would have taken the position adopted by the trial court, we find no error.

V. OFFENDER SCORE

We next determine whether the trial court miscalculated Rowland's offender score by treating a California misdemeanor burglary conviction as a Washington felony burglary conviction.

When computing a defendant's offender score, RCW 9.94A.360(3) provides that the sentencing court should classify out-of-state convictions according to the comparable Washington offense definitions and sentences. This classification procedure involves three steps. See State v. Weiand, 66 Wn. App. 29, 31-32, 831 P.2d 749 (1992). First, the court must identify the comparable Washington offense definition by comparing the elements of the out-of-state crime with the elements of potentially comparable Washington crimes in effect at the time the offense was committed. Weiand, at 31, 33. Second, the court must ascertain how Washington law classifies the identified comparable Washington crime. Finally, the court must assign that classification to the out-of-state conviction. Weiand, at 32.

Rowland contends that he was not convicted of burglary in California, but of shoplifting a pack of cigarettes. Therefore,

he argues, because that crime was a misdemeanor in both California and Washington in 1985,[3] the trial court erroneously added an extra point when calculating his offender score.

There is no evidence in the record, aside from Rowland's own testimony, showing that he was convicted only of shoplifting. To the contrary, Rowland's California criminal history transcript indicates that he was convicted of burglary under California Penal Code § 459. On appeal, we must therefore treat Rowland as if that was the crime of which he was convicted.

California Penal Code § 459 provides in relevant part: "Every person who enters any . . . store . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." In Washington, burglary in the second degree is defined as follows: "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle." RCW 9A.52.030(1) (1985). In comparing the two crimes, it appears that the California code, on its face, lacks an "enters or remains unlawfully" element. As the State points out, however, the California Supreme Court has expressly found that unlawful entry is an unwritten element of

[3] See RCW 9A.56.050(1) ("A person is guilty of theft in the third degree if he commits theft of property or services which does not exceed two hundred and fifty dollars in value.").

burglary. People v. Gauze, 542 P.2d 1365, 1367 (Ca. 1975). Given the implicit inclusion of this element, the elements of the California and Washington burglary offenses must be deemed comparable. Accordingly, because Washington classifies this offense as a class B felony, Rowland's out-of-state burglary conviction must similarly be treated as a class B felony. The trial court, therefore, did not err by adding an extra point to Rowland's offender score.

VI. EXCEPTIONAL SENTENCE

Finally, we consider whether the trial court's finding of deliberate cruelty is supported by the record and, if so, whether it justifies an exceptional sentence above the standard range.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range unless it finds that there are "substantial and compelling reasons justifying" an exceptional sentence. RCW 9.94A.120(1), (2); State v. Nordby, 106 Wn.2d 514, 516, 723 P.2d 1117 (1986). Appellate review of an exceptional sentence is governed by RCW 9.94A.210(4). Where, as here, the defendant challenges only the factual and legal sufficiency of the trial court's findings, the reviewing court must first determine, under a clearly erroneous standard of review, whether the record supports the reasons for imposing an exceptional sentence. The reviewing court must then decide whether, as a matter of law, the trial court's reasons justify

the imposition of an exceptional sentence. State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987).

In its written findings, the trial court does not specifically identify which defendant told Ecklund that he was dying, stuffed the cap into his mouth, or inflicted the 16 stab wounds. Rowland contends that this was error because there is no evidence in the record to support a finding that it was he who committed these acts. We have, however, already considered and rejected an identical argument made in codefendant Mawyer's case. State v. Mawyer, No. 28250-6-I (Dec. 27, 1993).

Under some circumstances, it is not essential for a trial court to differentiate the roles of the defendants when imposing an exceptional sentence. Specifically, when it is impossible to know the precise degree of a defendant's participation, but the record clearly establishes that the defendants acted together, the court may attribute particular acts to both defendants. See State v. Hawkins, 53 Wn. App. 598, 606, 769 P.2d 856, review denied, 113 Wn.2d 1004 (1989); State v. Altum, 47 Wn. App. 495, 505, 735 P.2d 1356, review denied, 108 Wn.2d 1024 (1987).

Here, while it is impossible to know which defendant stabbed Ecklund, told him that he was dying, and stuffed a hat in his mouth, there is substantial support in the record for the trial court's finding that these acts occurred and that Rowland and Mawyer were equal participants in the offense. That being

so, Washington law supports the proposition that Rowland and Mawyer must share culpability for Ecklund's death. At the time of sentencing, it was therefore not improper for the trial court to attribute the cruel acts leading to Ecklund's death to both Rowland and Mawyer.

Nevertheless, Rowland argues that even if supported by the record, the trial court's finding of deliberate cruelty does not justify the exceptional sentence. We disagree.

Deliberate cruelty is a statutory factor that may support an exceptional sentence. RCW 9.94A.390(2)(a); State v. Herzog, 69 Wn. App. 521, 526, 849 P.2d 1235, review denied, 122 Wn.2d 1021 (1993). It is characterized by gratuitous violence, either physical, psychological, or emotional, that is significantly more serious or egregious than typical of the crime. State v. Franklin, 56 Wn. App. 915, 918, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990). The court's finding of deliberate cruelty in this case is supported by several factors that distinguish the crime here from other crimes in the same category. First, the defendants carried out the offense through the infliction of multiple injuries.[4] Ecklund suffered not only

[4]See State v. Dunaway, 109 Wn.2d 207, 219, 743 P.2d 1237 (1987) (finding that second gun shot supported finding of deliberate cruelty); State v. Campas, 59 Wn. App. 561, 566, 799 P.2d 744 (1990) (finding that repeated bludgeoning and stabbing supported finding of deliberate cruelty), remanded, 118 Wn.2d 1014 (1992); State v. Worl, 58 Wn. App. 443, 452, 794 P.2d 31

an axe blow to his head, but sixteen stab wounds to his neck, back, head, and shoulders. The exceedingly gratuitous nature of this violence is further evidenced by the fact that the attack on Ecklund continued even as he attempted to flee. The repeated stabbing was clearly "deliberately cruel" and, therefore, aggravating.

Second, the defendants inflicted mental anguish and pain on Ecklund by unnecessarily terrorizing and demeaning him.[5] When asked what was happening, Ecklund was told, "You're dying, dude." And then, as Ecklund lay on the ground calling out for help, the defendants responded by leaving him to suffer and die with a hat stuffed in his mouth. This incident alone is perhaps the single most deliberately cruel and demeaning act in the entire case. We therefore find that, as a matter of law, the trial court's finding of deliberate cruelty justified an exceptional sentence above the standard range.

(1990) (finding that multiple stab wounds supported finding of deliberate cruelty), rev'd on other grounds, 117 Wn.2d 701 (1991); State v. Franklin, supra, 918-19 (finding that infliction of second stab wound was gratuitous and therefore aggravating); State v. Harmon, 50 Wn. App. 755, 760-61, 750 P.2d 664 (finding that infliction of multiple stab wounds supported finding of deliberate cruelty), review denied, 110 Wn.2d 1033 (1988)).

[5]See Altum, at 503 (finding that severe humiliation is deliberately cruel).

The judgment and sentence of the trial court are affirmed.

Coleman, J.

WE CONCUR:

Baker, A.C.J.

Grosse, J.